APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED AUGUST 22, 2006

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05-35922
D.C. No. CV-00-00167-A-HRH

MEMORANDUM*

ALASKA CONSTITUTIONAL LEGAL DEFENSE CONSERVATION FUND, INC.; DALE BONDURANT; WARREN OLSON; DANIEL A. DEVEREUX; SHANNON FARRAH; JAMES P. JACOBSON; W. TOM MINTER; GARY YOUNKIN,

Plaintiffs - Appellants,

v.

DIRK KEMPTHORNE,** Secretary of the Interior; MIKE JOHANNS, Secretary Department of Agriculture; KAATHLEEN CLARKE, Director Bureau of Land Management; DALE BOSWORTH, Chief of U.S. Forest Service; THOMAS H. BOYD, Representative of the Federal

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** Dirk Kempthorne has been substituted for his predecessor as Secretary of the Interior. Fed. R.App. P. 43(c)(2).

Appendix A

Subsistence Board, Office of Subsistence Management, U.S. Fish and Wildlife Services; STEVE KESSLER, Regional Subsistence Program Leader, U.S. Forest Service, Alaska Region; UNITED STATES OF AMERICA,

Defendants - Appellees,

ALASKA FEDERATION OF NATIVES,

Defendant-intervenor - Appellee.

Appeal from the United States District Court
for the District of Alaska
H. Russel Holland, Chief Judge, Presiding

Argued and Submitted July 25, 2006
Anchorage, Alaska

Before KOZINSKI, BERZON, and TALLMAN, Circuit Judges.

The district court properly concluded that the Plaintiffs' challenge to the Federal Subsistence Board's ("Board") regulation granting rural Alaskans priority for subsistence hunting constituted an "as-applied" challenge not barred by the statute of limitation. *See Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991).

The Board acted within its statutory authority under the Alaska National Interest Lands Conservation Act ("ANILCA") by enacting 50 C.F.R. § 100.5, which grants a preference for subsistence hunting to rural Alaskans.

Congress intended to protect the subsistence way of life for Native and non-Native rural Alaskans. *See* 16 U.S.C. §§ 3111(1), (4). Even if the preference is not explicitly provided for under Title VIII of ANILCA, the Board's interpretation of the statute was reasonable. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.* 467 U.S. 837, 843-844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

Nor does the preference violate the Equal Protection Clause. The classification must satisfy only rational basis review as it involves neither a suspect class nor a fundamental right. *See Nordlinger v. Hahn,* 505 U.S. 1, 10, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992). The preference for rural Alaskans serves a legitimate government interest. Congress sought to provide continued "opportunity for subsistence uses by rural residents of Alaska" in order to preserve the "Native physical, economic, traditional, and cultural existence" and the "non-Native physical, economic, traditional, and social existence." 16 U.S.C. § 3111(1); *see also Nordlingler,* 505 U.S. at 11 (stating that the "Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification"). Moreover, limiting participation in subsistence hunting to only rural Alaskans is rationally related to Congress's legitimate interest. In conserving Alaska's finite natural resources, Congress has made some progress in preserving the ability of rural Alaskans to rely on subsistence hunting.

The priority is also a proper exercise of congressional power under the Property Clause in that it is necessary to protect rural inhabitants of Alaska who rely on wildlife living on public lands as a source of food and commerce. *See Kleppe v. New Mexico,* 426 U.S. 529, 539, 96 S.Ct. 2285, 49 L.Ed.2d

34 (1976) ("[T]he [Property] Clause, in broad terms, gives Congress the power to determine what are 'needful' rules 'respecting' the public lands.").

The Plaintiffs conceded in the district court that the Public Trust Doctrine is currently applicable only to states. Because they provide no support for extending this doctrine to the federal government, the district court properly dismissed this claim.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA FILED AUGUST 18, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

No. A00-0167-CV (HRH)

THE ALASKA CONSTITUTIONAL LEGAL DEFENSE CONSERVATION FUND, INC. et al.,

Plaintiffs,

vs.

GALE NORTON, Secretary of the Interior, et al.,

Defendants.

ORDER

Motions for Summary Judgment

Plaintiffs move for summary judgment.[1] This motion is opposed,[2] and defendants and intervenor cross-move for summary judgment.[3] Oral argument has been requested but is not deemed necessary.

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1. Clerk's Docket No. 86.

2. Clerk's Docket Nos. 88, 91, 104, and 108.

3. Clerk's Docket Nos. 103 and 107.

Appendix B

Facts

Plaintiffs are The Alaska Constitutional Legal Defense Conservation Fund, Inc.; Dale Bondurant; Warren Olson; Daniel A. Devereux; Shannon Farrah; James P. Jacobson; W. Tom Minter; and Gary Younkin. Defendants are the United States; Gail Norton, Secretary of the Department of Interior; Mike Johanns, Secretary of the Department of Agriculture;[4] Kathleen Clark, Director of the Bureau of Land Management; Dale Bosworth, Chief of the United States Forest Service; Thomas H. Boyd, Assistant Regional Director of Subsistence for the Department of Interior; and Steve Kessler, Regional Subsistence Program Leader for the United States Forest Service.[5] Intervenor is the Alaska Federation of Natives.

This case arises out of defendants' implementation of the rural preference for subsistence hunting and fishing on Federal lands found in Title VIII of the Alaska National Interest Lands Conservation Act of 1980 (ANILCA), 16 U.S.C. §§ 3101-26. ANILCA establishes a preference for customary and traditional uses of fish and wildlife by according a priority for the taking of fish and wildlife on federal public lands in Alaska for non-wasteful subsistence uses by rural Alaska residents. 16 U.S.C. § 3114.

Plaintiffs commenced this action on June 6, 2000, alleging that they have been denied hunting and fishing

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4. Mike Johanns is substituted for Ann Veneman pursuant to Rule 25(d)(1), Federal Rules of Civil Procedure.

5. Steve Kessler is substituted for Ken Thompson pursuant to Rule 25(d) (1), Federal Rules of Civil Procedure.

opportunities on federal public lands because they are not rural residents of Alaska. Plaintiffs are either urban residents of Alaska or non-residents of Alaska. Plaintiffs' second amended complaint alleges two counts: 1) "The Regulations of ANILCA Unconstitutionally Discriminate[] – Violations of the Fifth Amendment"[6] and 2) "Challenges to Specific Acts of Defendants Pursuant to the A.P.A."[7] Several portions of both counts have been dismissed through prior motion practice.

In June of 2004, plaintiffs agreed to file a motion for summary judgment in which they would identify and present "all of the remaining claims they wish to present under Counts One and Two of their Second Amended Complaint for Declaratory Judgment and Injunctive Relief."[8] Plaintiffs thereafter filed the instant motion for summary judgment. The court's initial review of plaintiffs' motion for summary judgment, and the oppositions thereto, revealed that further development of the case was necessary. The court ordered plaintiffs to serve and file appropriate affidavits which demonstrated plaintiffs' standing to bring their claims.[9] Plaintiffs were also ordered to "identify with particularity the regulatory acts which they claim to have adversely and

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6. Second Amended Complaint at 10, Clerk's Docket No. 57.

7. *Id.* at 13.

8. Stipulation (June 4, 2004) at 3, Clerk's Docket No. 85.

9. Order re Case Status (Feb. 17, 2005) at 4-5, Clerk's Docket No. 94.

unlawfully impacted them."[10] In the February 17, 2005 case status order, the court also raised the possibility of cross-motions for summary judgment by defendants and intervenor.[11] In a subsequent order, the court clarified its position on potential cross-motions, noting that "it ha[d] often expressed the view that cross-motions for summary judgment are unnecessary in Administrative Procedure Act appeals" but that because defendants and intervenor had asserted affirmative defenses and the parties seemed to be in agreement that the case would be decided on legal issues, the court would entertain cross-motions.[12]

Plaintiffs submitted affidavits demonstrating their standing to bring their claims, and defendants and intervenor no long oppose plaintiffs' motion for summary judgment on standing grounds.[13] Plaintiffs have also identified the specific regulations and regulatory actions that they are challenging as follows:

1) 36 C.F.R. § 242.23, 50 C.F.R. § 100.5;

2) 36 C.F.R. § 242.5, 50 C.F.R. § 100.15;

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10. *Id.* at 5.

11. *Id.*

12. Order re Case Status (April 12, 2005) at 2, Clerk's Docket No. 102.

13. *See* Defendants' Supplemental Brief in Opposition to Plaintiffs' Motion for Summary Judgment at 4-5, Clerk's Docket No. 104 and Defendant-Intervenor's Supplemental Brief in Opposition to Plaintiffs' Motion for Summary Judgment at 4, Clerk's Docket No. 108.

Appendix B

3) 36 C.F.R. § 242.15, 50 C.F.R. § 100.23;[14]

4) 63 Federal Register 43990 - August 17, 1998;

5) 64 Federal Register 49278 - September 10, 1999;

6) 65 Federal Register 5197 - February 2, 2000;

7) 66 Federal Register 45082 - August 27, 2001;

8) 67 Federal Register 50619 - August 5, 2002;

9) 68 Federal Register 49734 - August 19, 2003;

10) 69 Federal Register 53023 - August 31, 2004.[15]

Plaintiffs contend that

> these actions are unlawful only because they operate to limit the Federal subsistence use

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14. The Federal subsistence management regulations are published both at 36 C.F.R. Part 242 and 50 C.F.R. Part 100. Hereinafter, this order will cite only to the version of the regulations found at 50 C.F.R. Part 100.

15. Plaintiffs' Supplemental Memorandum at 1-2, Clerk's Docket No. 97, as corrected by Joint Status Report at 1-2, Clerk's Docket No. 101.

> priority to rural Alaska residents and create a process and establish criteria to identify who is a rural Alaska resident. Plaintiffs are not contending that any specific rural or non-rural determination or any specific season or bag limit, or any specific criteria for determining who is a rural Alaska resident is unlawful.[16]

Defendants and intervenor have filed separate cross-motions for summary judgment, seeking dismissal of plaintiffs' second amended complaint in its entirety. All supplemental briefing on the pending cross-motions for summary judgment is complete and the cross-motions are ready for disposition.

Discussion

Plaintiffs' claims arise under the Administrative Procedure Act (APA). 5 U.S.C. §§ 701-06. The scope of the court's review of agency action is determined by section 706 of the APA, which provides that the court shall

> (1) compel agency action unlawfully withheld or unreasonably delayed; and
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> (2) hold unlawful and set aside agency action, findings, and conclusions found to be –
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> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

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16. Joint Status Report at 2, Clerk's Docket No. 101.

> (B) contrary to constitutional right, power, privilege, or immunity; [or]
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right. . . .

5 U.S.C. § 706.

First, defendants and intervenor argue that the seven regulatory actions set forth in the Federal Register to which plaintiffs cite are all proposed rules and thus are not subject to judicial review. Under the APA, the court's jurisdiction is limited to the review of final agency action. 5 U.S.C. § 704. In order for agency action to be final for purposes of judicial review, "the action must mark the 'consummation of the agency's decision-making process,' and must 'be one by which rights or obligations have been determined, or from which legal consequences will flow.'" *Alaska Dept of Envtl. Conservation v. EPA*, 244 F.3d 748, 750 (9th Cir. 2001) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)).

The seven Federal Register citations submitted by plaintiffs all pertain to proposed rules. The court lacks jurisdiction over plaintiffs' challenges to these seven regulatory actions because they are not final agency actions. Plaintiffs' claims based on the seven regulatory actions are dismissed.

Second, defendants argue that any challenge to the three final regulations cited by plaintiffs is barred by the statute of

limitations.[17] The three regulations being challenged by plaintiffs are 50 C.F.R. §§ 100.5, 100.15 and 100.23. Section 100.5 is entitled "Eligibility for subsistence use" and provides that "[y]ou may take fish and wildlife on public lands for subsistence uses only if you are an Alaska resident of a rural area or rural community." 50 C.F.R. § 100.5(a). Section 100.5 also specifies who may take fish and wildlife for subsistence use if a customary and traditional use determination has been made. In that instance, "only those Alaskans who are residents of rural areas or communities designated by the Board are eligible for subsistence taking of that population or stock on public lands for subsistence uses under the regulations in this part." *Id.* at § 100.5(b). Subsection (c) of section 100.5 provides that if no customary and traditional use determination has been made, then "all Alaskans who are residents of rural areas or communities may harvest for subsistence from that stock or population under the regulations in this part." 50 C.F.R. § 100.15 delegates to the Federal Subsistence Board the authority to determine "if an area or community in Alaska is rural." The regulation sets forth the specific criteria the Board must use to make rural determinations. The regulation also requires the Board to review rural determinations on a 10-year cycle. 50 C.F.R. § 100.15(b). The current rural determinations are listed at 50 C.F.R. § 100.23, which is the third regulation challenged by plaintiffs.

Defendants argue that any challenge to these regulations is governed by the six-year statute of limitations found in

17. Intervenor does not agree that plaintiffs' claims are barred by the statute of limitations. Intervenor urges the court to decide plaintiffs' claims as to the three regulations on the merits.

28 U.S.C. § 2401(a). Section 2401(a) provides that civil actions against the United States are barred "unless the complaint is filed within six years after the right of action first accrues." The three challenged regulations were first promulgated on May 29, 1992. Although defendants concede that the regulations have since been republished or have had changes to them proposed, defendants argue that the regulations have undergone no substantive changes since 1992. Thus, defendants argue that any challenge to these regulations had to have been made within six years of May 29, 1992. Because plaintiffs filed this action in 2000, their challenge to these regulations, according to defendants, comes too late.

In the Ninth Circuit, if "a challenger contests the substance of an agency decision as exceeding constitutional or statutory authority, the challenger may do so later than six years following the decision by filing a complaint for review of the adverse application of the decision to the particular challenger." *Wind River Mining Corp. v. United States,* 946 F.2d 710, 715 (9th Cir. 1991). "The challenge must be brought within six years of the agency's application of the disputed decision to the challenger." *Id.* at 716. Here, plaintiffs primarily complain about how the regulations were applied to them in 1997, 1998, and 1999. Because plaintiffs brought their complaint within six years of the regulations being applied to them, their claims based on the three regulations are not barred by the statute of limitations.

Turning then to the merits of plaintiffs' challenge to the three regulations, plaintiffs did not submit any supplemental briefing in which they explain why these regulations are

unlawful. Therefore, the court must rely on plaintiffs' original briefing to attempt to discern what it is about these regulations that plaintiffs believe is unlawful. This is not an easy task because, as has been noted before, plaintiffs' original briefing often seemed to be directed toward a constitutional challenge to Title VIII of ANILCA, as opposed to a challenge to specific regulations promulgated by the Secretaries. The court has already determined that plaintiffs are barred by the statute of limitations from attacking the constitutionality of Title VIII of ANILCA on its face.[18] Despite their repeated attempts, plaintiffs simply cannot raise the issue of whether Congress validly exercised its power when it enacted Title VIII of ANILCA. After plaintiffs' arguments that have nothing to do with the challenged regulations and everything to do with an impermissible constitutional challenge to ANILCA are discarded, plaintiffs can fairly be said to be challenging the "rural preference" regulations on three grounds: 1) they are unconstitutional as applied to plaintiffs because they violate plaintiffs' rights under the Commerce Clause, 2) they are unconstitutional as applied to plaintiffs because they violate plaintiffs' right to equal protection; and 3) they are unlawful because the Secretaries exceeded their statutory authority when they promulgated the regulations because the Secretaries only had the authority to create a priority for subsistence uses and they did not have the authority to exclude certain people from using federal lands.

Plaintiffs pose the question of whether the Commerce Clause can support a regulation that excludes every non-

18. *See* Order re Motion to Dismiss (Feb. 4, 2002) at 10, Clerk's Docket No. 32.

resident hunter of the United States from hunting on federal lands in Alaska and argue that such a regulation clearly violates the Commerce Clause. What plaintiffs seem to be arguing is that the regulations prevent them from participating in interstate commerce because the non-resident plaintiffs cannot travel to Alaska to hunt and fish. Plaintiffs cite to no authority to support their contention that the challenged regulations violate the Commerce Clause, other than to cite to an opinion by this court in *McDowell v. United States,* Case No. A92-531, in which the court observed that the Commerce Clause was broad enough to support Congress' power to enact ANILCA.

Plaintiffs have conceded that hunting and fishing in Alaska substantially affects interstate commerce.[19] Congress, and by delegation the Secretaries, has the power to regulate activities that have a substantial relation to interstate commerce. *See United States v. Lopez,* 514 U.S. 549, 558-59 (1995). Plaintiffs' Commerce Clause violation argument must fail because it is based on the faulty premise that all non-resident hunters and fishers are excluded from hunting and fishing on federal public lands. The challenged regulations do not exclude every non-resident hunter of the United States from hunting on federal public lands. The regulations create a priority for subsistence uses, but once that priority is satisfied, others, including non-residents of Alaska, may hunt on federal public lands. The challenged regulations, as applied to plaintiffs, do not violate the Commerce Clause or exceed the Secretaries' delegated power to regulate hunting and fishing on federal public lands.

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19. Motion for Summary Judgment at 14, Clerk's Docket No. 86.

Appendix B

Plaintiffs next contend that regulations which deny them, as urban residents of Alaska and non-residents of Alaska, the right to subsistence hunt or fish on federal public lands in Alaska violate equal protection principles. Although plaintiffs mention both the Fifth and the Fourteenth Amendments, because plaintiffs are challenging federal regulations, their equal protection argument must be deemed brought pursuant to the Fifth Amendment.

"In determining whether the regulation violates the Fifth Amendment, we must first determine the level of scrutiny to apply." *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1277 (9th Cir. 2004). There are three levels of scrutiny: "strict scrutiny, intermediate scrutiny, or rational basis review." *Id.* "Strict scrutiny is applied when the classification is made on 'suspect' grounds such as race, ancestry, alienage, or categorizations impinging upon fundamental rights such as privacy, marriage, voting, travel, and freedom of association." *Id.* Intermediate scrutiny applies to "certain other suspect classifications, such as gender." *Id.* "When no suspect class is involved and no fundamental right is burdened, we apply a rational basis test to determine the legitimacy of the classifications." *Id.* at 1277-78.

Defendants and intervenor argue that the rational basis review standard applies here because there is no suspect classification involved and the categorization does not impinge on a fundamental right. Plaintiffs argue that strict scrutiny applies here because the regulations impinge on a fundamental right found in the Alaska state constitution and on the fundamental right to interstate travel found in the federal Constitution. Plaintiffs also argue that this is really a

racial classification because most of the people excluded from subsistence hunting and fishing are non-Natives.

Whether the regulations impinge on any fundamental right found in the Alaska constitution is irrelevant to the standard of review analysis for an equal protection claim. In determining whether a fundamental right has been impinged, the court looks to the Federal Constitution, not the state constitution. *See San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 33-34 (1973). Plaintiffs' argument that this is a racial classification also fails. The classification at issue here is not a racial classification, but one based on place of residency. In fact, Congress rejected a racial classification when it amended the original version of ANILCA which created a subsistence priority for Natives only.

"The Supreme Court has recognized a fundamental right to interstate travel." *Miller v. Reed,* 176 F.3d 1202, 1205 (9th Cir. 1999). "To infringe upon a fundamental right, the regulation must impose a penalty effecting a genuinely significant deprivation of the basic necessities of life or the denial of a fundamental political right." *Barber v. State of Hawaii,* 42 F.3d 1185, 1197 (9th Cir. 1994). The regulations, as applied to the non-residents plaintiffs, may have created a "genuinely significant deprivation" of plaintiffs' right to interstate travel. The non-resident plaintiffs had permits to hunt sheep in particular areas in Alaska and planned to travel to Alaska for that reason. When those areas were closed because of the subsistence priority for rural residents, the non-residents arguably suffered a significant deprivation of their fundamental right to interstate travel.

Assuming without deciding that strict scrutiny applies here, the court examines the regulations to see if they are narrowly tailored to serve a compelling governmental interest. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). Plaintiffs contend that any regulation that automatically deprives 90 percent of the state's population from hunting and fishing on federal lands cannot possibly withstand a strict scrutiny test.

The court disagrees. Congress clearly set out its basis for distinguishing between rural residents and non-rural residents and non-residents. In 16 U.S.C. § 3111, Congress expressly stated that

> (1) the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the public lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence;
>
> (2) the situation in Alaska is unique in that, in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses[.]

Protecting the physical, economic, traditional, and cultural existence of people in Alaska is a compelling governmental

issue as is "the national interest in the proper regulation, protection, and conservation of fish and wildlife on public lands in Alaska." *See* 16 U.S.C. § 3111(5). The rural preference regulations are aimed at these compelling governmental interests. The regulations are narrowly tailored because they only afford a subsistence priority to rural residents, residents who might not have other alternative food sources available. Urban residents of Alaska or non-residents of Alaska are not prevented from ever hunting and fishing on federal public lands. They may hunt and fish on federal public lands once subsistence needs are met. Because the challenged "rural preference" regulations are narrowly tailored to serve a compelling governmental interest, plaintiffs' equal protection challenge to the regulations fails.

Lastly, plaintiffs argue that the Secretaries have exceeded their statutory authority because the regulations make no attempt to protect fish and game stocks but instead create a rural preference. Plaintiffs insist that Title VIII of ANILCA requires the Secretaries to determine the extent of the resources first and then to set a priority of uses. Plaintiffs contend that all the Secretaries have done with the "rural preference" regulations is exclude users.

This argument is meritless because the statute itself establishes a rural preference. Title VIII of ANILCA provides that "the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes." 16 U.S.C. § 3114. "Subsistence uses" are defined as "the customary and traditional uses by *rural* Alaska

residents of wild, renewable resources. . . ." 16 U.S.C. § 3113 (emphasis added). Furthermore, Congress found that

> the continuation of the opportunity for subsistence uses by *rural* residents of Alaska, including both Native and non-Natives, on public lands . . . is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence.

16 U.S.C. § 3111 (emphasis added). The Secretaries were then delegated the authority to promulgate regulations to implement ANILCA. 16 U.S.C. § 3124. In doing so, the Secretaries did not invent the need for a rural preference for subsistence hunting and fishing. The statute dictated that the subsistence priority be afforded to rural residents. The Secretaries have not exceeded their statutory authority by promulgating regulations that exclude non-rural residents and non-residents of Alaska from participating in *subsistence* hunting and fishing on federal public lands.

Conclusion

Plaintiffs' motion for summary judgment is denied. Defendants' and intervenor's motions for summary judgment are granted. Plaintiffs' second amended complaint is dismissed with prejudice. The clerk of court shall enter judgment accordingly.

Appendix B

DATED at Anchorage, Alaska, this 16 day of August, 2005.

s/ H. Russel Holland, Judge
H. Russel Holland, Judge
District of Alaska

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA FILED MARCH 4, 2003

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

No. A00-0167-CV (HRH)

THE ALASKA CONSTITUTIONAL LEGAL DEFENSE CONSERVATION FUND, INC. et al.,

Plaintiffs,

vs.

GALE NORTON, Secretary of the Interior, et al.,

Defendants.

ORDER

Motion to Accept Amended Complaint

Plaintiffs have filed a motion to accept their amended complaint.[1] Defendants and intervenor oppose the motion.[2] Oral argument has not been requested and is not deemed necessary.

FACTS

Plaintiffs' original complaint[3] seeking declaratory and injunctive relief alleged four causes of action in relation to

1. Clerk's Docket No. 47.

2. Clerk's Docket Nos. 49, 50.

3. Clerk's Docket No. 1.

the Alaska National-Interest Lands Conservation Act (ANILCA): (1) violations of the Equal Footing Doctrine, the Submerged Lands Act, and the Statehood Compact;[4] (2) violations of the Tenth Amendment of the Constitution and the Enumerated Powers Doctrine;[5] (3) a violation of the Fourteenth Amendment of the Constitution;[6] and (4) a violation of the Administrative Procedure Act (APA).[7] By order dated February 4, 2002, this court dismissed three of plaintiffs' four causes of action: Counts One, Two, and Four.[8] Count Three was also dismissed except to the extent that it presented an "as-applied" challenge to ANILCA.

The order of February 4, 2002, also dismissed without prejudice the lead plaintiff, Alaska Constitutional Legal Defense Conservation Fund, Inc. (ACLDCF), for lack of standing. Leave to amend was granted by this court so that plaintiffs might show sufficient injury to ACLDCF to satisfy the requirements of standing.

On June 3, 2002, this court entered an order as a result of the status conference of May 29, 2002.[9] In that order, the court tentatively held that this case is one that raises issues which should be addressed under the APA. 5 U.S.C. §§ 701-

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4. *Id.* at 13-14.

5. *Id.* at 14-16.

6. *Id.* at 16-17.

7. *Id.* at 17-18.

8. Clerk's Docket No. 32.

9. Clerk's Docket No. 42.

706. Plaintiffs were granted until September 30, 2002, to file a motion to amend their complaint and the amended complaint. This court requested that plaintiffs address in their amendment both the question of whether or not ACLDCF had standing and which administrative actions would be the focus of this case.

At the request of plaintiffs, the September 30, 2002, deadline was extended to October 30, 2002.[10] Plaintiffs filed their amended complaint on October 30, 2002,[11] without the predicate motion to amend. After notice by this court given November 5, 2002, plaintiffs filed their motion to amend on November 6, 2002.[12]

The amended complaint sets forth four counts: (1) the regulations of ANILCA unconstitutionally discriminate, violations of the Fifth and Fourteenth Amendments;[13] (2) a violation of the Administrative Procedure Act;[14] (3) a violation of the Public Trust Doctrine;[15] (4) claims specific

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10. Clerk's Docket Nos. 43, 44.

11. Clerk's Docket No. 45. The court notes that when presented to the clerk's office, the amended complaint was filed and docketed at Clerk's Docket No. 45. However, the amended complaint was thereafter stricken from the docket *(see* Minute Order (Nov. 5, 2002), Clerk's Docket No. 46), and has since been treated as a lodged document.

12. Clerk's Docket Nos. 46, 47.

13. Amended Complaint at 10-14.

14. *Id.* at 14-16.

15. *Id.* at 16-19.

to the Alaska Constitutional Legal Defense Conservation Fund.[16]

DISCUSSION

Under Rule 15 (a) , Federal Rules of Civil Procedure, "leave shall be freely given [to amend] when justice so requires."[17] In the Ninth Circuit, "Rule 15's policy of favoring amendments to pleadings should be applied with 'extreme liberality.'" *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981) (*citing Rosenberg Brothers & Co. v. Arnold*, 283 F.2d 406 (9th Cir. 1960) (per curiam)).

Defendants and intervenor request that this court deny plaintiffs' motion to amend, contending that the proposed amendments are futile. *See Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 772 (9th Cir. 1991) (explaining that the court may deny leave to amend if the amendment is futile). Furthermore, they argue that plaintiffs are trying to reinstate claims previously dismissed by this court. *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir. 1993) ("[A] court is generally precluded from reconsidering an issue :hat has already been decided by the same court, or a higher court in the identical case."); *see also Kasey v. Molybdenum Corp. of America*, 467 F.2d 1284, 1285 (9th Cir. 1972) ("[A]mendments should lot be allowed merely to permit a

16. *Id.* at 20-21.

17. Rule 15(a) states in pertinent part:

> [A] party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

restatement of the same facts in different language or the reassertion of a claim previously determined.")

Count One

The Regulations of ANILCA Unconstitutionally Discriminate— Violations of the Fifth and Fourteenth Amendments

Intervenor calls into question plaintiffs' contention that they have a claim based on the Fourteenth Amendment. This court previously determined that any claim based on the Fourteenth Amendment applies to the actions of states, not actions by the federal government.[18]

Plaintiffs concede this point and respond that to the extent that Count One addresses the Fourteenth Amendment, it should be treated as applicable to the State of Alaska. The State of Alaska is not a party to this case. Plaintiffs' Fourteenth Amendment allegations must be deleted. Beyond this point, plaintiffs' Count One may state a claim that regulations under ANILCA are unconstitutional as applied to the plaintiffs.

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18. Order re Motion to Dismiss at 8 (Feb. 4, 2002), Clerk's Docket 32.

Appendix C

Count Two

Violation of the Administrative Procedure Act

Both defendants and intervenor object to the amended Count Two as a new version of the previously dismissed Count Four which was based on the Administrative Procedure Act.[19] Plaintiffs' amended complaint includes a completely rewritten APA claim. As rewritten, it bears little resemblance to the original complaint's Count Four. According to plaintiffs, this court reinstated the APA claim in its June 3, 2002, order.

Plaintiffs have substantially misunderstood what the court intended to flow from a status conference held in May of 2002 and the order of June 3, 2002, which followed.[20] As a result of that conference, the court expected that plaintiffs would become better informed as a result of examining defendants' public files as regards their claims that ANILCA regulations were invalid as applied, that plaintiffs would move to amend (which plaintiffs have now done), and that the amended complaint would take the form of a challenge to specific actions of the defendants pursuant to the APA. The court did not, as alleged at paragraph 35 of the amended complaint, reinstate plaintiffs' APA count.[21] The APA is a vehicle for bringing the substance of plaintiffs' amended

19. *See* Order re Motion to Dismiss at 13 (Feb. 4, 2002), Clerk's Docket No. 32.

20. Clerk's Docket No. 42.

21. Amended Complaint at 15.

Count One before the court. Counts One and Two of the amended complaint should be melded.

Both defendants and intervenor are concerned that plaintiffs are renewing a claim for tort damages under the Federal Tort Claims Act, a claim that was previously disavowed.[22] Plaintiffs, in their reply, state that Jacobson is not seeking damages under the Federal Tort Claims Act.[23] The court takes plaintiffs at their word. The amended complaint does not and will not be deemed to include a claim against the defendants which would be subject to the Federal Tort Claims Act.

Count Three

The Public Trust Doctrine

Plaintiffs reallege a violation of the Public Trust Doctrine, formerly dismissed by this court in its February 4, 2002, order.[24]

Plaintiffs argue that the State of Alaska violated the Public Trust Doctrine by not "challenging the [ANILCA] regulations on a[n] equal protection basis; by allowing the regulations to discriminate on the basis of residency,

22. Plaintiffs' Opposition to Motion to Dismiss at 21, Clerk's Docket No. 26.

23. Plaintiffs' Reply to Opposition to Motion to Amend at 6, Clerk's Docket No. 52.

24. Order re Motion to Dismiss at 8 (Feb. 4, 2002), Clerk's Docket 32.

prescription and alienation of resources; and by failing to challenge the regulations on the basis of the Tenth Amendment."[25] These arguments are meritless inasmuch as the State of Alaska is not a party to this case.

Conceding that the Public Trust Doctrine is currently applicable only to the State of Alaska, plaintiffs next argue that the doctrine could be expanded—by this litigation—to include the federal government.[26] As support for the renewal of this claim, plaintiffs have included a copy of the publication, *Putting the Public Trust Doctrine to Work*, as an exhibit.[27] According to plaintiffs, this publication supports their contention that the Public Trust Doctrine includes certain activities pertaining to the federal government.

The court perceives nothing in the publication which supports an action against the federal government under the Public Trust Doctrine. The exhibit is incomplete and is apparently some kind of catalog of how certain land cases are treated in various jurisdictions.

The court still perceives no legal basis for a public trust cause of action against the federal government. This court

25. Amended Complaint at 17. Plaintiffs also include claims based on violations of the Equal Footing Doctrine, the Submerged Lands Act, and the Common Use Clause—all claims previously dismissed by this court. See Order re Motion to Dismiss at 5-8 (Feb. 4, 2002), Clerk's Docket 32.

26. Plaintiffs' Reply to Opposition to Motion to Amend at 5, Clerk's Docket No. 52.

27. *Putting the Public Trust Doctrine to Work*, attached as Exhibit 21 to Amended Complaint.

previously noted that plaintiffs had not provided any authority to support an action against the federal government under the Public Trust Doctrine, and plaintiffs still have failed to provide that authority.

Because the State of Alaska has allegedly violated the Public Trust Doctrine by not suing the federal government, plaintiffs assert third-party standing. This court did note in its previous order that in narrowly tailored circumstances a litigant may be permitted to bring an action on behalf of a third party.[28] However, the only authority plaintiffs cite is the case of *Alaskans for a Common Language v. Kritz*, 3 P.3d 906 (Alaska 2000), in which the court allowed the intervention of a third party when it was established that the State of Alaska was not sufficiently protecting the third party's fundamental rights.

Kritz deals with intervention during ongoing litigation; *Kritz* was not about establishing third-party standing. Moreover, plaintiffs themselves have sued the State of Alaska as to the matter at hand. *Alaska Constitutional Legal Defense Conservation Fund, Inc. v. Knowles*, No. 3AN-01-10316. Although it is not entirely clear, the court infers that the state court case has been resolved, for plaintiffs relate that the Alaska Supreme Court found that the "litigation decision" by the Governor was a political choice and not subject to the Court's jurisdiction.

Plaintiffs still have not shown that they have standing to assert a public trust claim on behalf of the State of Alaska. Plaintiffs must delete Count Three from their amended complaint.

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28. Order re Motion to Dismiss at 7 (Feb. 4, 2002), Clerk's Docket 32.

Appendix C

Count Four

Claims Specific to Alaska Constitutional Legal Defense Conservation Fund

This court previously dismissed ACLDCF as a plaintiff, with leave to amend. ACLDCF did not properly allege that it was a member organization or that it was suing on behalf of its members.[29] Count Four is ACLDCF's attempt at remedying its lack of standing.

Defendants contend that, Count Four should not be a separate claim. There are no allegations being made against defendants on Count Four; rather, it only contains a description of ACLDCF's purpose and injuries it may suffer or have suffered.

Plaintiffs' Count Four does not state a separate legal wrong or cause of action. ACLDCF's standing allegations should set forth with the rest of plaintiffs' standing allegations, in the beginning of the amended complaint.

Other Matters

Defendants may still question the adequacy of ACLDCF's standing allegations, but they do not support that contention at this time.[30]

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29. Order re Motion to Dismiss at 14 (Feb. 4, 2002), Clerk's Docket 32.

30. ACLDCF has alleged that it is a membership organization, ____ ACLDCF still has not confirmed that it is suing on behalf of its members, or that ACLDCF was injured as a corporation. In filing a ____ised, amended complaint, plaintiffs must fully evaluate and plead ____ basis for their standing to sue.

Appendix C

The parties debate the purpose and efficacy of plaintiffs' actual allegations concerning Warren Olson's denial of subsistence permits.[31] Plaintiffs assert that Olson is not seeking review of another administrative decision denying him a subsistence permit. Rather, Olson's allegations are to provide a basis for the argument that ANILCA regulations as-applied are unconstitutional, and that Olson will continue to be denied a hunting permit in Wrangell-St. Elias National Park, because of this as-applied discrimination.

The Olson allegations are not set forth as a separate cause of action in plaintiffs' complaint. Whether or not the Olson matter is relevant to plaintiffs' challenge to the application of defendants' regulations goes to the merits of plaintiffs' claims, not the adequacy of plaintiffs' amended complaint.

According to defendants, plaintiffs appear to be contesting temporary subsistence management regulations in 1990, 55 Fed. Reg. 27114-170 (June 29, 1990).[32] These temporary regulations were replaced by final regulations, 57 Fed. Reg. 22530-567 (May 28, 1992). Plaintiffs respond by stating that they intended to challenge the final 1992 regulations and are sorry for the confusion. Plaintiffs shall clarify this point in filing a revised, amended complaint.

Finally, defendants are concerned that plaintiffs are attempting a facial challenge of ANILCA through the guise of challenging the regulations. Plaintiffs respond by stating that they are not facially challenging ANILCA, but rather

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31. Amended Complaint at 4.

32. *Id.* at 8, ¶¶ 18-19, ¶ 28.

they are contesting the enforcement of ANILCA through regulation. Here, also, plaintiffs shall make the foregoing point clear and express in their revised, amended complaint.

CONCLUSION

Plaintiffs' amended complaint which is presently lodged with the court[33] may not be filed. It must be revised to state plainly and concisely how and why particular regulations of the defendants are unlawful as applied. Plaintiffs' complaint is encumbered by bulky exhibits which are neither necessary nor useful to the statement of plaintiffs' claim. The case must be developed from the certified administrative record. To this end, plaintiffs must, in reviewing their complaint, detail (by date and subject matter) what agency actions are being challenged. Plaintiffs' revised amended complaint shall be served and filed on or before March 28, 2003.

DATED at Anchorage, Alaska, this 3 day of February, 2002.

s/ H. Russel Holland
H. Russel Holland
United States District Judge

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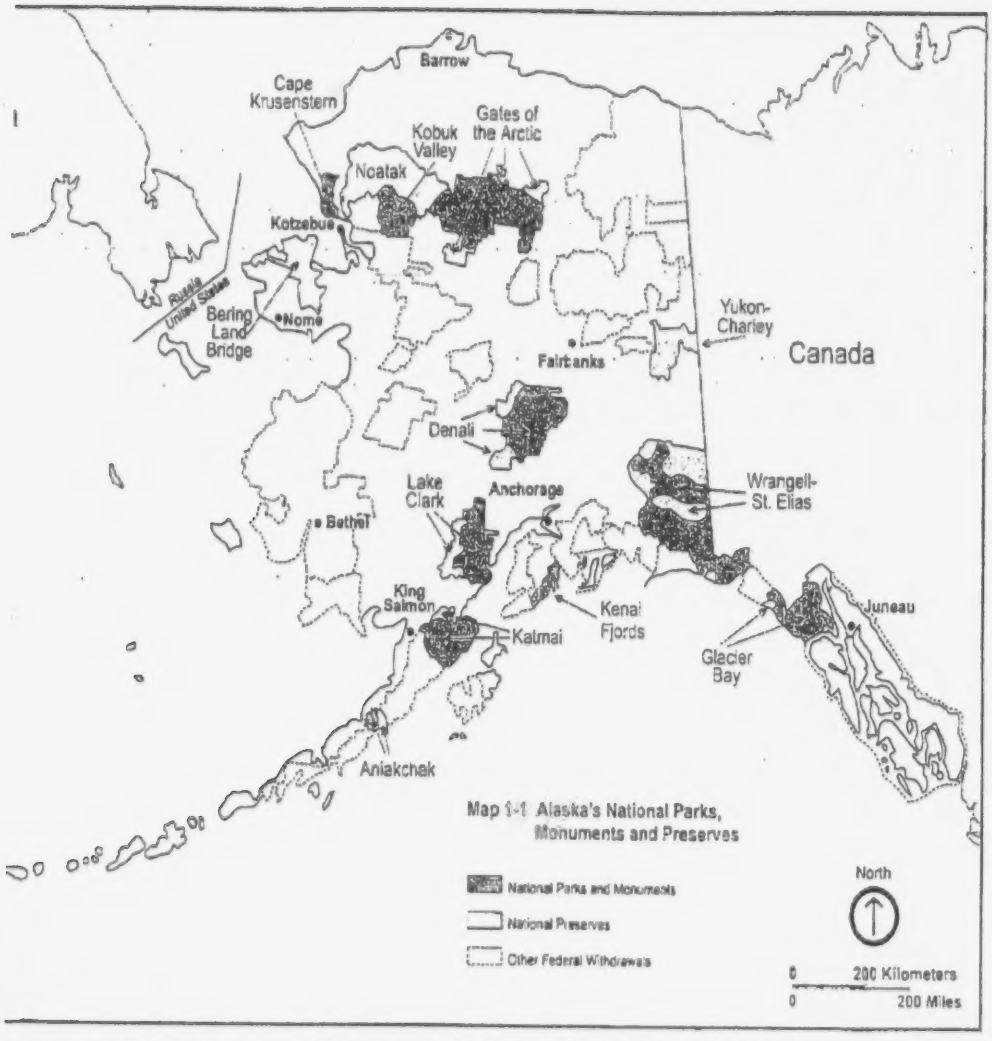
33. *See* Minute Order (Nov. 5, 2002), Clerk's Docket No. 46.

APPENDIX D — MAP. ALASKA'S NATIONAL PARKS, MONUMENTS AND PRESERVES, NORRIS "ALASKA SUBSISTENCE, PAGE 1-1, (NATIONAL PARK SERVICE, 2004)



Page 1 – Norris "Alaska Subsistence" (National Park Service, 2004)

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